IN THE

# Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1979

No. 78-1829 ~~Misc.~~

DAVID E. MIKE, ERNEST S. MIKE, and ANN MIKE,

*Petitioners,*

v.

SIGMA NU FRATERNITY (UNINCORPORATED NATIONAL FRATERNITY ASSOCIATION), SIGMA NU FRATERNITY-EPSILON MU CHAPTER (UNINCORPORATED LOCAL FRATERNITY ASSOCIATION), BUTLER UNIVERSITY, EPSILON MU HOUSE ASSOCIATION, INC., MARK V. BOHNERT, BRUCE CARMICHAEL, MARK R. CHAPPUIS, DAVID T. CUNNINGHAM, DAVID DEER, ROGER R. DODSON, THOMAS J. FISCHER, CHRIS GLANCY, BRADFORD D. GOFFINET, JOHN R. GUGGENHEIM, JERRY W. HIGHLEY, DAVID HULLETT, TIMOTHY KELLY, DAVID LANTNER, JAY LOVE, THOMAS S. MENCH, KENT E. MOORE, MARK MORELLI, LEE SCHLUGE, JR., FRANCHON M. SMITHSON, STEVE A. TAYLOR, STEPHEN J. VIRGIL, and ANDREW J. WETZEL,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Sigma Nu Fraternity (Unincorporated National Fraternity Association), Sigma Nu Fraternity-

Epsilon Mu Chapter (Unincorporated Local Fraternity Association), Butler University, Epsilon Mu House Association, Inc., Mark V. Bohnert, Bruce Carmichael, Mark R. Chappuis, David T. Cunningham, David Deer, Thomas J. Fischer, Chris Glancy, Bradford D. Goffinet, John R. Guggenheim, Jerry W. Highley, David Hullett, Thomas S. Mench, Kent E. Moore, Mark Morelli, Lee Schluge, Jr., Steve A. Taylor, Stephen J. Virgil, and Andrew J. Wetzel respectfully submit the following brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Indiana.

## JURISDICTION

The jurisdiction of this Court is claimed under that portion of 28 U.S.C. §1257(3) which reads as follows:

> "...or where any title, right, privilege or immunity is specially set up or claimed under the Constitution...of the United States."

It affirmatively appears from the record that no title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed in the Indiana Supreme Court. (See Appellants' Petition for Transfer to the Indiana Supreme Court, Appendix "B" to the Petition for Writ of Certiorari, pages A-3 through A-6).

## QUESTIONS PRESENTED

Petitioners' statement of the circumstances under which they did not timely file the transcript of proceedings is incomplete, misleading, and inconsistent with the facts which were before the Court of Appeals of Indiana and the Indiana Supreme Court, in the following respects:

1. Although there were dual entries in the record that Petitioners' Motion to Correct Errors had been denied on two different dates, the first such date shown by the record was not December 22, 1977, as



Petitioners assert, but December 20, 1977. (See page 1096 of the record, Appendix "E" to the Petition for Writ of Certiorari, page A-12, which is the first page of the order book entry of proceedings on December 20, 1977)

2. Petitioners could not possibly have relied on the second entry which indicated that their Motion had been denied on January 4, 1978, as they assert, for the reason that on the previous day, January 3, 1978, Petitioners had already initiated their appeal, pursuant to Appellate Rule 2(A), by filing a Praecipe for a transcript of the record, and five days before January 4, 1978, i.e., on December 30, 1977, Petitioners had served a copy of such Praecipe on opposing parties. (See pages 1108 and 1109 of the record, Appendix 2 of this brief)
3. Petitioners could not reasonably have been misled by the record as to the date their Motion to Correct Errors was denied, as they assert, for the reason that the clerk of the trial court duly notified all parties that such Motion had been overruled on December 20, 1977, in compliance with Trial Rule 72(D). (See copy of such notice, supported by affidavit, filed in the Court of Appeals and the Indiana Supreme Court, Appendix 1 of this brief)
4. Petitioners' failure to timely file the transcript could not reasonably have been the result of "the manner in which the clerk of the trial court compiled the record," as they assert, for the reason that in Indiana appellate practice the record is compiled and prepared for filing by the appellant (in this case, by Petitioners), not by the clerk of the trial court.
5. Petitioners' failure to file the transcript within 90 days from December 20, 1977, did not constitute "excusable" neglect for the reason that they obtained such transcript from the clerk of the trial court on January 19, 1978 (see their Statement of the Case, page 6 of the Petition) and thus had sixty-one (61) days in which to examine the record, discover

any purported ambiguity, make further inquiry, or request an extension of time pursuant to Appellate Rule 14(A).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

No question whatever concerning the Fourteenth Amendment to the Constitution of the United States or due process of law was presented or decided in the Indiana state courts. In addition to 28 U.S.C. §1257(3), the only provisions of law involved in this case are state rules of procedure, as follows:

### Trial Rule 72
### TRIAL COURTS AND CLERKS

* * *

(D) Notice of orders or judgments. Immediately upon the entry of a ruling upon a motion, an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in the Appellate Rules. Service by mail upon any attorney who is present at the time the entry is made shall not be required if such fact is noted in the record or is noted in the docket by the clerk.

### Appellate Rule 2
### INITIATION OF THE APPEAL AND NOTICE TO OPPOSING PARTIES

(A) Initiation of the appeal. An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the



proceedings, and that said praecipe shall be filed within thirty [30] days after the court's ruling on the motion to correct errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

### Appellate Rule 3
### SUBMISSION OF THE APPEAL

(A) Submission. Every appeal shall be deemed submitted and the appellate tribunal deemed to have acquired jurisdiction thereof on the date the record of the proceedings is filed with the clerk of the Supreme and Appellate Courts.

(B) Time within which the appeal must be submitted. In all appeals and reviews, except those from interlocutory orders, the record of the proceedings must be filed with the clerk of the Supreme and Appellate Courts within ninety [90] days from the date of the judgment or the ruling on the motion to correct errors, whichever is later. In appeals and reviews of interlocutory orders the record of the proceedings shall be filed within thirty [30] days of the ruling. However, if the statute under which the appeal or review is taken fixes a shorter time, the time fixed by the statute shall prevail.

### Appellate Rule 14
### EXTENSIONS OF TIME

(A) Filing of the petition. Petititions for an extension of time to file papers required to be filed within a prescribed time by these rules must be filed before the expiration of such time and will be granted only upon a verified petition disclosing facts which establish to the satisfaction of the court that despite due diligence the time allowed by the rules will not suffice. Except in appeals from interlocutory orders, petitions for extension of time shall be filed at least five [5] days before the expiration of the time to be extended unless it is made to appear by affidavit that the facts which are the basis of the petition did not then exist or were not then known to the applicant or his counsel.

The Indiana Rules of Trial and Appellate Procedure may be found in *Burns Indiana Statutes Annotated (Code Edition), Book 1* and *Book 2*, respectively.

## STATEMENT OF THE CASE

Petitioners' Statement of the Case fails to comply with Rule 23(1)(f) of this Court which provides in pertinent part as follows:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings...at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them...; and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record...as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioners could not, of course, so comply because no federal question was raised or passed upon in the state courts of Indiana.

Petitioners' Statement of the Case requires clarification by the following facts which are material to a consideration of the question attempted to be presented:

1. On December 20, 1977, the trial court overruled Petitioners' Motion to Correct Errors. (Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition for Writ of Certiorari, page A-2)
2. On December 22, 1977, the clerk of the trial court notified all counsel of record that said Motion had been overruled on December 20, 1977. (Such notice consisted of a copy of Sheet No. 4 of the Civil Docket showing all entries from 3/29/77 through and including 12/20/77, together with the clerk's notation of service in compliance with Rule 72(D) on 12/22/77; Appendix 1 of this brief)



3. On December 30, 1977, Petitioners served on opposing parties a copy of their Praecipe for a transcript of the record to be used on appeal to the Court of Appeals of Indiana. (Page 1109 of the record, Appendix 2 of this brief)
4. On January 3, 1978, Petitioners' Praecipe was filed with the clerk of the trial court thereby initiating their appeal pursuant to Appellate Rule 2(A). (Pages 1108 and 1109 of the record, Appendix 2 of this brief)
5. The time within which to file the record of the proceedings with the clerk of the Court of Appeals expired on Monday, March 20, 1978. (Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition for Writ of Certiorari, page A-2)
6. Although Petitioners' counsel obtained the certified transcript of the record from the clerk of the trial court on January 19, 1978, the record was not tendered to the clerk of the Court of Appeals until March 22, 1978. (Petitioners' Statement of the Case, page 6 of the Petition; Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition, page A-2)
7. Petitioners neither sought nor obtained an extension of time from the Court of Appeals of Indiana within which to file the record of the proceedings. (Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition, page A-2)
8. The Court of Appeals of Indiana found that it had no jurisdiction of Petitioners' appeal. (Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition, page A-2)
9. Petitioners' request to the Indiana Supreme Court to grant a transfer of the cause and reverse the Court of Appeals stated six specifications of alleged error, all based on state law. None of such specifications set up or claimed any right of appeal under the Constitution of the United States or any denial of due process of law. (Appellants' Petition for Transfer, Appendix "B" to the Petititon for Writ of Certiorari, pages A-3 through A-6)

10. The Indiana Supreme Court denied such Petition for Transfer, all Justices concurring, without any federal question having been raised or passed upon. (Appendix "G" to the Petition, page A-15)

## SUMMARY OF ARGUMENT

No federal question was presented or decided in the Indiana state courts. Through a lack of due diligence and failure to avail themselves of relief provided by law, Petitioners' attempted appeal was dismissed for want of jurisdiction. Petitioners did not claim any constitutional right or any denial of due process in the Indiana state courts, and the questions there presented and decided involved only general principles of appellate practice and procedure under Indiana law. Accordingly, Writ of Certiorari should be denied.

Jurisdictional time limitations for perfecting an appeal do not violate due process, nor is failure to comply therewith a federally-protected right. Petitioners had the same right to appeal as other litigants, subject to the same conditions. Due process does not require a special dispensation for failure to exercise due diligence. If it did, there would never be an end to litigation, and delayed appeals could be taken months, or even years, after the normal time had expired, thereby producing intolerable uncertainty and confusion.

Time limitations for appeals are based on substantial considerations of public policy with respect to the finality of judgments, and there are no unusual circumstances in this case to override such public policy.

If a state must create exceptions for excusable neglect to satisfy due process, Indiana has done so, but Petitioners failed to avail themselves of the remedy provided. The neglect in this case is wholly inexcusable.

Finally, even if due process had been seasonably raised, there are no "special and important reasons" for granting certiorari here. This case exhibits a common, everyday, garden variety of carelessness and miscalculation that does not merit the attention of this Court.

## ARGUMENT

### A.

### Certiorari Should be Denied for Want of Jurisdiction Because No Federal Question was Presented or Decided in the State Courts

The statute conferring jurisdiction on this Court to review final judgments of state courts by writ of certiorari requires that rights under the Constitution of the United States be "specifically set up or claimed." 28 U.S.C. §1257(3). Under this provision, it is a jurisdictional requirement that a federal constitutional right shall have been first set up or claimed in the state court so as to invoke a decision thereon, and this fact must affirmatively appear, not only on the face of the record, but also on the face of the Petition for Writ of Certiorari. This Court has consistently so held and has consistently declined to review constitutional questions not so presented or decided. *Edelman v. California*, 344 U.S. 357, (1953); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965); *Monks v. New Jersey*, 398 U.S. 71 (1970); 32 Am.Jur.2d, *Federal Practice and Procedure*, Sec. 303.

Although Petitioners assert that the Court of Appeals of Indiana and the Indiana Supreme Court "have decided a federal question of substance," they failed to point out wherein such question was purportedly raised and the way in which it was purportedly decided, as required by Rule 23(1)(f) of this Court. They could not do so, of course, because no federal question was presented or decided.

It is abundantly clear from the record that this case is wholly devoid of any federal question. It involves only general principles of Indiana appellate practice and procedure. The attempted appeal was dismissed by the Court of Appeals of Indiana for want of jurisdiction and the Indiana Supreme Court denied the Petition for Transfer. Nothing in the order of the Court of Appeals (Appendix "A" to the Petition for Writ of Certiorari) nor in the Petition for

Transfer (Appendix "B") even remotely suggests that due process was invoked or decided.

Petitioners have demonstrated by their presentation of the case that they failed to file the record on appeal within the time required to confer jurisdiction in the Court of Appeals of Indiana and that they were not diligent in ascertaining such time. Petitioners' request to the Indiana Supreme Court to review the decision of the Court of Appeals (their Petition for Transfer) asserted and relied on various propositions of Indiana law. Such request for review did not assert or rely on any federal Constitutional right or any denial of due process. They now complain *for the first time to this Court* that due process was denied. This they cannot do. *Monks v. New Jersey, supra,* 398 U.S. 71.

The Petition for Writ of Certiorari speaks for itself that only nonfederal questions were involved and, therefore, this Court is without jurisdiction in this case.

## B.

## Noncompliance With the Indiana Jurisdictional Requirement for Taking an Appeal is Not a Federally-Protected Right Under the Due Process Clause

It is well-settled in Indiana that the timely filing of the transcript of the record is jurisdictional, and unless the record is filed within the time prescribed by law the appellate tribunal does not acquire jurisdiction of the subject matter and the appeal will be dismissed. *Brindle v. Anglin,* 246 Ind. 601, 208 N.E.2d 476 (1965); *Eggers v. Wright,* 253 Ind. 44, 245 N.E.2d 331(1969); *State v. Bridenhager,* 257 Ind. 544, 276 N.E.2d 843 (1971); *State v. Tyner,* 257 Ind. 575, 277 N.E.2d 157(1972); *Wadkins v. Thornton,* 151 Ind. App. 380, 279 N.E.2d 849 (1972); *Matter of Estate of Garwood,* Ind.App., 382 N.E.2d 1020 (1978).

The principle of law with respect to jurisdictional time requirements is the same in federal practice (where timely



filing of the Notice of Appeal is "mandatory and jurisdictional"). *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257 (1978). It is also the same in most other jurisdictions. 4 Am.Jur.2d, *Appeal and Error,* Sec. 292.

The question which Petitioners attempt to present for the first time to this Court is whether noncompliance with the Indiana jurisdictional requirement for taking an appeal is a federally-protected right under the due process clause. Respondents respectfully submit that certiorari should be denied for the reason that such question is manifestly not of constitutional dimension.

### 1. The Material Facts

This is a civil case, an action by Petitioner David E. Mike and his parents for damages arising out of an accident when Mike was struck by an automobile during a fraternity initiation hike. The record shows the following material facts:

Mike was a student at Butler University in Indianapolis and a pledge to the local chapter of Sigma Nu Fraternity. The accident occurred when he was walking backward on a state highway at night with his back to oncoming traffic. The persons sued included the Fraternity, its local chapter, the University, and other students who were members of the Fraternity. The driver of the automobile was not among the defendants in this case.

On Motions for Summary Judgment by the several defendants (Respondents herein), it was undisputed that neither the University, the Fraternity, nor the local chapter house association had authorized, directed, controlled, or even knew about the activity in question, and that the accident was proximately caused by Mike's own conduct, which was in violation of Indiana highway safety law without excuse or justification. The trial court found that there was no genuine issue of material fact and that the

defendants (Respondents herein) were not liable as a matter of Indiana law.

On December 2, 1977, the Petitioners filed a Motion to Correct Errors in the trial court. (This Motion is similar to a motion for new trial in federal practice, and where such post-judgment motion is filed, the time for taking an appeal runs from the date of the ruling thereon. Indiana Appellate Rule 3(B), page 5, *supra.*)

Thereafter, the following events occurred:

On December 20, 1977, defendant Sigma Nu Fraternity filed a brief in opposition to the Motion to Correct Errors, and on the same day, December 20, 1977, the trial court overruled the Motion to Correct Errors. (Finding of the Court of Appeals of Indiana, Appendix "A" to the Petition for Writ of Certiorari, page A-2)

This finding is supported by the trial court's civil docket (Appendix 1 of this brief) and by pages 1096 through 1104 of the record, which contain the clerk's transcript of all order book entries and papers filed on that day, in compliance with the rule of Indiana Appellate Procedure which governs the contents of the record on appeal, Appellate Rule 7.2(A)(2). Such transcript reads as follows:

> "AND AFTERWARD, to-wit: on the 20th day of December, 1977, before the Honorable V. Sue Shields, Judge thereof, the following further proceedings were had herein, to-wit:
>
> "Sigma Nu Fraternity's Answer Brief in Opposition to Plaintiffs' Motion to Correct Errors filed, as follows:
>
> [The rest of the page is blank and pages 1097 through 1103 of the transcript contain a copy of such brief, as required by the Rule]
>
> "Motion to Correct Errors overruled.
>
> "Copies of above served on all parties this date in compliance with Rule 72(d). 12/22/77 All counsel of record."



The foregoing quotation is from pages 1096 and 1104, respectively, of the record. (See Appendix "E" and "C", pages A-12 and A-10 of the Petition for Writ of Certiorari.)

These two pages are not in proper sequence in Petitioners' Appendix, nor did they see fit to include the intervening seven pages or any notation of their content, which would have made it obvious to this Court that the entry appearing on page 1104 was indeed a continuation of the entry for December 20, 1977, which began on page 1096.

On December 22, 1977, the clerk of the trial court notified all counsel of record that Petitioners' Motion to Correct Errors had been overruled on December 20, 1977. (Appendix 1 of this brief)

Such notice consisted of a copy of the entire Sheet No. 4 of the trial court's Civil Docket showing all entries in the cause from March 29, 1977, through and including December 20, 1977, together with the clerk's notations of the volume and page of the Order Book where such entries also appear. The clerk's note of service on all counsel of record, in compliance with Trial Rule 72(D), page 4, *supra*, appears immediately following the last entry for December 20, 1977. The notice to counsel reads in pertinent part as follows:

> "12/20/77 Sigma Nu Fraternity's Answer Brief in Opposition to Plaintiffs' Motion to Correct Errors filed. Motion to Correct Errors overruled.
>
> Copies of above served on all parties this date in compliance with Rule 72(d). 12/22/77 All counsel of record[22]"

The foregoing quotation is from Appendix 1 of this brief, which is a copy of the notice from the clerk of the trial court received by counsel for one of the Respondents herein. Appendix 1 was before the Court of Appeals of Indiana and

the Indiana Supreme Court, as shown by the certificate of the clerk of those courts.

Such notice was also received by counsel for all other Respondents in this case. Petitioners have not denied that they, too, received such notice. They have merely ignored it.

It clearly appears from a comparison of the clerk's notice with pages 1096 and 1104 of the transcript that page 1104 is a continuation of the entry for December 20, 1977, not a new entry for a later date. It further appears that Petitioners could not reasonably have been misled by the continuation page. In any event, such contention was rejected by the Indiana state courts, and this Court does not sit to decide questions of fact or the application of local law. *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335 (1944).

By December 30, 1977, Petitioners had prepared a Praecipe for a transcript of the record to be used on appeal, and on said date served a copy on opposing parties. Thereafter, on January 3, 1978, Petitioners' Praecipe was filed with the clerk of the trial court. (Pages 1108 and 1109 of the record, Appendix 2 of this brief)

Petitioners thus initiated their appeal on January 3, 1978, within 30 days after the court's ruling on their Motion to Correct Errors, as required by Indiana Appellate Rule 2(A), pages 4-5, *supra*. (In Indiana practice, the Praecipe is similar to and serves the same function as the Notice of Appeal, pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure, and the Designation of the Record, pursuant to Rule 10(b).)

The record also shows that on December 23, 1977, after the trial court had already overruled the Motion to Correct Errors, another opposing brief was received and filed. (Appendix "C" to the Petition for Writ of Certiorari, page A-10) Thereafter, on January 4, 1978, an entry indicated that the Motion was again overruled. (Appendix "D", page A-11)



The second entry was apparently occasioned by the receipt of the additional opposing brief, and after the Christmas holiday period, the trial court may well have forgotten that the Motion had been overruled 15 days earlier, and overruled it again. Whatever the reason, it is clear that Petitioners did not rely on the second entry as showing the date when their Motion to Correct Errors was overruled, because they had already prepared, served, and filed their Praecipe. Appellate Rule 2(A) requires that the Praecipe be filed *after the Motion has been overruled, not before*. It would be illogical and poor practice to commence an appeal and thus incur the possibly unnecessary expense of a transcript before the court has ruled on the Motion.

### 2. Petitioner's Contentions and Authorities

In support of the theory that dismissal of their attempted appeal denied them due process of law, Petitioners make two purported excuses for late filing. First, they represent that they relied on the entry of January 4, 1978, as the date when their Motion to Correct Errors was overruled and were misled thereby. In the alternative, they represent that they relied on the fact that page 1104 of the transcript was not dated, and complain about the manner in which the clerk prepared the transcript.

The short answer to both contentions is, of course, their Praecipe. Something prompted Petitioners to prepare and file a Praecipe for a transcript to be used on appeal before the second entry of January 4, 1978, and Respondents submit it was the clerk's notice (which all other counsel received), which told them that their Motion had been overruled on December 20, 1977.

Even if, upon examination of the transcript, they were "confused" by the two entries, it is well-settled in Indiana that the first of two or more rulings on a Motion to Correct Errors controls. The time to file the transcript runs from the date of the original ruling, not from any subsequent rulings occasioned by motions to reconsider, additional

briefs, or even by agreement of the parties. *Mohney v. State*, 159 Ind.App. 246, 306 N.E.2d 387 (1974), Transfer denied; *Wadkins v. Thornton*, 151 Ind.App. 380, 279 N.E.2d 849 (1972). The mistake for which excusable neglect might apply in a proper case must be one of fact and not of law. 3 Wiltrout, *Indiana Practice*, (1967) §2475.

Petitioners say they did not "realize" that the undated page 1104 of the transcript was a continuation of the entry for December 20, 1977. Due care would have revealed such fact, and neglect or oversight of counsel is not grounds for a belated appeal. *Davidson v. State*, 248 Ind. 26, 220 N.E.2d 340 (1966), Cert.den. 387 U.S. 911.

Unlike federal practice (in which the clerk of the District Court compiles and transmits the record), in Indiana practice the clerk merely prepares and certifies copies of all papers and order book entries and delivers them to the appellant. It is the duty of counsel for the appellant (Petitioners herein) to assemble the pages in chronological order, number the pages, make marginal notes, prepare an index, bind, and file the transcript with the clerk of the Court of Appeals in Indianapolis. See 2 Bobbitt, *Indiana Appellate Practice and Procedure*, (1972) Chap. 49; Bagni, Giddings & Stroud, *Indiana Appellate Procedure*, (1979) §45.

The compilation of the record in this case and the pagination was Petitioners' work product, not the clerk's. Petitioners admit having obtained the transcript from the clerk on January 19, 1978. (See their Statement of the Case, page 6 of the Petition) Therefore, they had 61 days before the due date in which to discover any purported ambiguity, make further inquiry, or request an extension of time. They did none of the above, and cannot now shift the blame to someone else.

Petitioners assert an "absolute right" of appeal under the Indiana Constitution as amended in 1970. Although there was no right to appeal at common law, a constitutional



right to appeal in Indiana has existed by decision of the Indiana Supreme Court long before 1970. *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). A constitutional right to appeal simply means that the Legislature cannot deny it by statute; it does not mean that rules of practice and procedure can be ignored. 3 Wiltrout, *Indiana Practice*, (1967) §§2111, 2114. The Indiana Supreme Court, both before and after 1970, has consistently dismissed appeals where the record was not timely filed. *Eggers v. Wright*, 253 Ind. 44, 245 N.E.2d 331 (1969); *State v. Bridenhager*, 257 Ind. 544, 276 N.E.2d 843 (1971).

Petitioners say that this Court has recognized that failure to timely file a transcript "for reasons beyond the litigant's control" is not sufficient justification for dismissing an appeal. This may be true, but the two cases cited by Petitioners do not so hold. In *Alviso v. United States*, 73 U.S. 457 (1867), the transcript was timely filed but the clerk of the Federal District Court neglected to include a "citation." Thereafter, the clerk's office was partially destroyed by fire and the paper was lost, and this Court re-instated the appeal.

In *St. Louis & San Francisco R. Co. v. Spiller*, 275 U.S. 158 (1927), the clerk of this Court had included a direction in the mandate for payment of costs. On motion to retax costs, Mr. Justice Brandeis, for the Court, held that clerical errors, if any, by the clerk could be corrected after expiration of the term.

Neither of these two cases, nor the other three decisions of this Court cited by Petitioners, involved untimely filing of transcripts (or any other jurisdictional matter) and therefore are not in point.

Petitioners also cite three Indiana cases which are not pertinent. *Soft Water Utilities v. LeFevre*, 261 Ind. 260, 201 N.E.2d 745 (1973), involved the timely filing of a Praecipe,

and the question was whether the trial court had abused its discretion by changing the date of its ruling on the Motion to Correct Errors pursuant to Indiana Trial Rule 60(B). The facts were that appellant's counsel did not receive notice from the clerk of the ruling and, in addition, the clerk gave him incorrect information by telephone as to the date of the ruling. The court found no abuse of discretion under such circumstances.

*Soft Water* stands for the proposition that the Praecipe (required by Indiana Appellate Rule 2(A) to be filed in the trial court) is not jurisdictional, and late filing may be excused by the trial court where the clerk has given false information to counsel. This decision has no effect on Indiana Appellate Rule 3(B), which requires the transcript to be filed in the Court of Appeals, and it does not change the law that timely filing of the transcript is jurisdictional.

*Soft Water* has been limited to its facts. See Bagni, Giddings & Stroud, *Indiana Appellate Procedure*, §82 (1979) and *American Metal Climax v. State Board of Tax Commissioners*, 159 Ind.App. 468, 307 N.E.2d 507 (1974). In the case at hand, no false information was given to counsel by the clerk, and Petitioners do not deny that they received actual notice from the clerk of the correct date. (See Appendix 1 of this brief) Their subsequent disregard of such notice, careless examination of the record, and failure to request an extension of time in the manner provided by the Rules, can only be chargeable to themselves. As the Indiana Supreme Court said in a 1978 decision (involving different facts but the same principle):

> "We . . . [are not required] to grant special dispensation to those who, by their own voluntary acts, fail to meet the time limitations of the procedures that have been designed for uniform application." *Lewis v. State*, Ind., 375 N.E.2d 1102 at page 1104.

*Costanzi v. Ryan*, Ind.App. (1977), 368 N.E.2d 12, was an appeal from a "nonappealable" interlocutory order, which



requires special certification by both the trial and appellate courts pursuant to Indiana Appellate Rule 4(B)(5), added in 1976. The procedure is new and uncertain, and the court held that the time for filing the transcript ran from the date when the Court of Appeals had granted leave to appeal, rather than from the date when an interlocutory order appealable by right would have been overruled. *Costanzi* is obviously not applicable here.

*Anderson v. Indiana State Employees Appeals Commission*, Ind.App., 360 N.E.2d 1040 (1977) Transfer denied, is cited by Petitioners apparently as authority that they were entitled to rely on one entry in the record (without examination of the entire record or further inquiry), but the case does not so hold. In *Anderson* the judgment of the trial court was summarily affirmed because of multiple deficiencies in the transcript and brief. One such deficiency was failure to include all order book entries, perhaps a mistake of the clerk but chargeable, nevertheless, to the appellant.

It is abundantly clear from the foregoing discussion of Petitioners' contentions and authorities that this is not a case meriting the attention of this Court. To find a denial of due process under the circumstances exhibited by this record would be to reward the lack of due diligence with a special dispensation.

### C.

### There Must be a Definite Point in Time When Litigation shall Come to an End, as a Matter of Public Policy, to Avoid Intolerable Uncertainty and Confusion

This Court has long recognized that, even in a criminal case, due process does not require a state to provide appellate review, and when an appeal is provided, it is competent for a state to prescribe the procedure and conditions. *McKane v. Durston*, 153 U.S. 684 (1894); *Lott v.*

*Pittman*, 243 U.S. 588 (1917); *Ortwein v. Schwab*, 410 U.S. 656 (1973).

Time limitations for the assertion of various rights are universal and do not deny due process. *Mattson v. Department of Labor and Industries of State of Washington*, 293 U.S. 151 (1934). That a state may impose reasonable time limitations for taking an appeal is beyond dispute. 4 Am.Jr.2d, *Appeal and Error*, Sec. 6.

In both the federal and state systems, the right of an appeal is conditioned on the filing of *something* within a prescribed time limit, even in criminal cases. In the federal system, it is a notice of appeal, which must be filed within 10 days after entry of the judgment (Rule 4(b) of the Federal Rules of Appellate Procedure). In Indiana, it is the record of the proceedings (the transcript), which must be filed within 90 days after the ruling on the Motion to Correct Errors (Rule 3(B) of the Indiana Rules of Appellate Procedure). In both systems, federal and state, such time limit is jurisdictional. *United States v. Robinson*, 361 U.S. 220 (1960); *Davidson v. State*, 248 Ind. 26, 220 N.E.2d 340 (1966), Cert.den. 387 U.S. 911.

Time limitations for appeals are based on substantial considerations of public policy with respect to the finality of judgments, similar to the policy which favors statutes of limitation for the commencement of actions as statutes of repose. See 51 Am.Jr.2d, *Limitation of Actions*, Sec. 16. As this Court pointed out in *Matton Steamboat Co. v. Murphy*, 319 U.S. 412 (1943):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application [for allowance of an appeal] has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeate its purpose." *Matton Steamboat Co. v. Murphy, supra*, 319 U.S. 412 at page 415.



The above language was recently quoted with approval by this Court in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 98 S.Ct. 556 (1978) at page 561 of the Supreme Court Reporter.

In *United States v. Robinson*, 361 U.S. 220 (1960), this Court held that late filing of a notice of appeal did not confer jurisdiction on the Court of Appeals, even though the District Court had found such late filing the result of "excusable neglect." Discussing the possibility that courts might be given the power through the rule-making process to extend the time for excusable neglect, this Court said:

> "...it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion." *United States v. Robinson, supra*, 361 U.S. 220 at page 230.

Power has now been given to District Courts in both civil and criminal cases to extend the time for filing a notice of appeal upon a showing of excusable neglect, but for a period not to exceed 30 days. (Rules 4(a) and (b), Federal Rules of Appellate Procedure) Even so, the parameters of "excusable neglect" are limited, and the federal courts have not hesitated to affirm denials of an extension of time or to reverse grants thereof, and dismiss the appeal as untimely. See, for example, *Long v. Emery*, 383 F.2d 292 (10th Cir. 1967); *Levisa Stone Corporation v. Elkhorn Stone Company*, 411 F.2d 1208 (6th Cir. 1969), Cert.den. 397 U.S. 925; *Weedon v. Gaden*, 419 F.2d 303 (D.C. Cir. 1969); *Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971), Cert.den. 404 U.S. 840; *Kramer v. American Postal Workers Union*, 556 F.2d 929 (9th Cir. 1977). See also *Files v. City of Rockford*, 440 F.2d 811 (7th Cir. 1971) wherein the Court said at pages 814, 816:

"The basic rationale for insistence upon timely filing is the necessity for providing a precisely ascertainable point of time at which litigation comes to an end.

* * *

"Casting this substantial doubt on the finality of judgments would increase the burdens of an already overloaded federal judiciary. 9 Moore's, *supra* [Moore's Federal Practice] ¶204.13[2] at 978."

Also mindful of an overloaded judiciary, Indiana has consistently rejected ingenious claims of "excusable neglect" which amount to nothing more than mere miscalculation of time. In *Eggers v. Wright*, 253 Ind. 44, 245 N.E.2d 331 (1969), for example, the Supreme Court accepted transfer and ordered the appeal dismissed (after a decision on the merits by the Court of Appeals) because the transcript was filed one day late. With respect to appellant's contention of excusable neglect, the Court said:

"A mistake or miscalculation of time by counsel who have a responsibility to perfect an appeal as grounds for disregarding time limitations definitely fixed by rules of this Court would open a 'Pandora's Box' of excuses and uncertainties with which this Court would have to contend in all future cases." *Eggers v. Wright, supra*, 245 N.E.2d 331 at page 333.

Like all jurisdictional requirements, Indiana Appellate Rule 3(B) is based on the same public policy expressed by this Court, other federal courts, and the Indiana Supreme Court over the years, which is, that there shall be a definite point in time when litigation shall come to an end.

## D.

## That a State May, Consistent with Due Process, Hold an Appellant to Compliance With Jurisdictional Time Limits Has Been Decided by this Court

Although this Court has not decided in a civil case the question of whether dismissal of an appeal for



noncompliance with a state jurisdictional time limitation denies due process of law, it has decided this question in a criminal case, and decided it adversely to Petitioners. *Daniels v. Allen*, decided *sub nom. Brown v. Allen*, 344 U.S. 443 (1952).

In *Daniels* (a capital case) the defendants were granted 60 days within which to serve a statement of the case on appeal, the jurisdictional act in North Carolina. Such statement was not served until the 61st day. This Court affirmed judgments of the District Court and Court of Appeals denying federal habeas corpus for failure to pursue state remedies, saying:

"The state furnished an adequate and easily complied-with method of appeal.... Yet petitioners' appeal was not taken and the State of North Carnolina, although the full trial record and statement on appeal were before it, refused to consider the appeal on its merits.

* * *

"North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. [Citations omitted] We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure." *Daniels v. Allen, supra*, 344 U.S. 443 at pages 485-486.

*Daniels v. Allen* has been cited and relied on by Federal Courts of Appeal in like holdings. For example, in *United States ex rel. Brown v. Smith*, 306 F.2d 569 (2nd Cir. 1962), the prisoner had failed to file his notice of appeal within the time required by the law of Vermont. The court reversed the District Court's grant of habeas corpus, saying:

"The Vermont courts afforded Brown all the rights of review to which he was constitutionally entitled in view of his failure to file a timely appeal in accordance with the Vermont statute, and thus we find no constitutional

error in the denial of full appeal under the circumstances.

* * *

"Daniels v. Allen makes it clear that it is constitutional for a state to require literal compliance with reasonable rules whether or not failure to comply makes any practical difference or not." *United States v. Smith, supra*, 306 F.2d 596 at pages 597, 606.

This Court denied certiorari, 372 U.S. 959.

In *United States ex rel. Green v. Pate*, 411 F.2d 884 (7th Cir. 1969), federal habeas corpus was denied after the Illinois Appellate Court had refused to entertain a late appeal. On appeal to the Court of Appeals for the Seventh Circuit, the petitioner contended that he was deprived of his constitutional right to appeal in violation of due process and equal protection because the trial court had failed to advise him that he had a right to appeal. Rejecting such contentions, the court discussed numerous decisions of this and other federal Courts with respect to the right of appeal, and held as follows:

"The State Court rule did not discriminate against petitioner or any other convicted defendant when it fixed a time within which an appeal could be taken. We think an appeal sought beyond the time thus fixed, like an appeal sought beyond the time fixed by the Federal Rules of Criminal Procedure, would deprive a reviewing court of jurisdiction." *United States v. Pate, supra*, 411 F.2d 884 at page 887.

This Court also denied certiorari, 396 U.S. 1018.

The rule of *Daniels v. Allen, supra*, 344 U.S. 443, i.e., that a state may, consistent with due process, hold a criminal appellant to literal compliance with time requirements, has been re-affirmed by this Court with respect to both state and federal time requirements. See *Irvin v. Dowd*, 359 U.S. 394 (1959), wherein this Court, in an opinion by Mr. Justice Brennan, took the occasion to point out that:



"The petitioner was entitled to appeal, as a matter of right, from that judgment [of conviction], provided, in compliance with a State Supreme Court rule, the appeal was perfected by filing with the Clerk of the Supreme Court a transcript of the trial record and an assignment of errors within 90 days of the judgment." *Irvin v. Dowd, supra*, 359 U.S. 394 at page 401.

The point was that, unlike the situation in *Daniels v. Allen*, petitioner Irvin had timely perfected his appeal in full compliance with Indiana procedure. More recently, in *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), in an opinion by Mr. Justice Powell, this Court held that an untimely post-judgment motion could not toll the time to file a notice of appeal, and therefore the Court of Appeals was without jurisdiction. This Court re-affirmed that "This 30-day time limit is 'mandatory and jurisdictional.'"

So in the case at hand. Petitioners failed to comply with the Indiana jurisdictional time limit; Indiana has applied its law in refusing their out-of-time appeal; and Petitioners were not thereby deprived of any constitutional right of due process.

Not only is the Indiana 90-day rule not unreasonably short, but more important, Petitioners had a remedy by way of an extension of time, pursuant to Indiana Appellate Rule 14(A), page 5, *supra*. They failed to avail themselves of the relief so provided, and cannot now be heard to say that they were "denied" extra time which they did not request.

Although Petitioners seek to shift the blame to the clerk, even to the trial court, the fact is, as the record plainly shows, they simply disregarded the clerk's notice of the date on which their Motion to Correct Errors was overruled; failed to examine the transcript carefully; miscalculated the time; and then failed to pursue the remedy available to them by Indiana law for their claimed

"confusion,"—a petition to the appellate tribunal for an enlargement of time.

Even if due process had been seasonably raised in the state courts, there were no circumstances beyond Petitioners' control to warrant a change in settled law and public policy. Time limitations for taking an appeal have always accorded with this Court's conception of proper procedure. The Constitution of the United States has not yet federalized state jurisdictional time requirements for appeals, and it should not do so on the record presented here.

## CONCLUSION

Respondents respectfully submit that this case is not a proper one for review by certiorari by this Court, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# Appendix

# APPENDIX 1

Filed
Billie R. McCullough
APR 21 1978
Clerk of the
Indiana Supreme and
Court of Appeals

STATE OF INDIANA )
) SS:
COUNTY OF MARION )

AFFIDAVIT

THOMAS J. McKEON deposes and says:

1. I am one of the attorneys for Appellee SIGMA NU FRATERNITY-EPSILON MU CHAPTER (UNINCORPORATED LOCAL FRATERNITY ASSOCIATION) and have personal knowledge of the matters stated in this Affidavit.

2. Attached hereto as Exhibit "A" is a true and accurate copy of the notice attorneys for Appellee SIGMA NU FRATERNITY-EPSILON MU CHAPTER (UNINCORPORATED LOCAL FRATERNITY ASSOCIATION) received December 23, 1977 from the trial court in this cause.

3. This notice shows a date of December 20, 1977, as the date for the overruling of the Motion to Correct Errors.

I affirm under the penalties for perjury, that the foregoing representations are true.

/s/ THOMAS J. McKEON
THOMAS J. McKEON

| Date | MINUTES OF THE COURT |
|---|---|
| 3/29/77 S29-112 | Defendant, Epsilon Mu House Association, Inc., files Motion for Enlargement of Time to Respond or Object to Plaintiff's Request for Production of Documents. Motion granted and the time is extended to and including the 3rd day of May, 1977 as per order filed. |
| 4/1/77 S29-220A | Motion for Extension of Time filed by the Defendant, Sigma Nu Fraternity, Unincorporated National Fraternity Association. |
| 4/5/77 S29-292 | Defendant Butler University's Motion for Enlargement of Time to Respond or Object to Plaintiff's Request for Production of Documents filed and submitted; motion granted as per order filed. |
| 4/18/77 S29-517 | Motion for Summary Judgment of defendants Hullet, Moore and Fischer submitted with parties appearing by counsel; argument heard; motion taken under advisement. |
| 4/22/77 S29-618 | Memorandum in Opposition to Motion for Summary Judgment as to Butler University, National Sigma Nu Fraternity and Epsilon Mu House Association Inc. filed. |
| S30-541 2 Jun 77 | Defendants Steve A. Taylor and Mark Morelli file Motion for Summary Judgment. |
| S30-615 7 Jun 77 | Defendant David Deer's Motion for Summary Judgment filed. |
| Oct/4/77 S33-308 | Findings of Fact and Conclusion of Law and Judgment for defendants and against plaintiffs entered and filed. |



| | |
|---|---|
| 12/2/77 S34-614 | Plaintiffs' Motion to Correct Errors and Brief in Support of Plaintiffs' Motion to Correct Errors filed. |
| 12/20/77 | Sigma Nu Fraternity's Answer Brief in Opposition to Plaintiffs' Motion to Correct Errors filed. Motion to Correct Errors overruled. |
| | Copies of above served on all parties this date in compliance with Rule 72(d) 12/22/77 All counsel of record(22) |

EXHIBIT "A"

## CERTIFICATION

I, Marjorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original pages of a brief in #2-378A98 as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of June, 1979.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Kent A. Phenis, Deputy

SEAL

## APPENDIX 2

AND AFTERWARD, to-wit: on the 3rd day of January, 1978, before the Honorable V. Sue Shields, Judge thereof, the following further proceedings were had herein, to-wit:

Praecipe filed, as follows:

Filed
Billie R. McCullough
MAR 22 1978
Clerk of the
Indiana Supreme and
Court of Appeals



Filed
JAN 3 1978
Helen Porter
Clerk Hamilton Superior
Court

IN THE HAMILTON COUNTY SUPERIOR COURT

STATE OF INDIANA ) SS:
COUNTY OF HAMILTON )

| | | |
|---|---|---|
| DAVID E. MIKE, ERNEST S. MIKE and ANN MIKE, | ) | |
| *Plaintiffs* | ) | |
| vs. | ) | |
| SIGMA NU FRATERNITY, et al, | ) | CAUSE NO. S75-796 |
| *Defendants* | ) | |
| vs. | ) | |
| GREAT AMERICAN INSURANCE COMPANY, | ) | |
| *Third Party Defendant* | ) | |

PRAECIPE

To the Clerk of the Superior Court of Hamilton County:

You are hereby requested to prepare and certify a transcript in the above entitled cause including all pleadings, interrogatories, depositions, orders and entries of the Court to be used on appeal to the Indiana Court of Appeals.

YAEGER, FOLEY & McLIN

By /s/ Donald Foley
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by first class mail to the following attorneys of record this 30th day of December, 1977:

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Mr. C. V. Malan
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Noblesville, IN 46060

Filed
Billie R. McCullough
MAR 22 1978
Clerk of the
Indiana Supreme and
Court of Appeals



CERTIFICATION

I, Marjorie H. O'Laughlin, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original pages 1108 and 1109 #2-378A98 as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of June, 1979.

/s/ Marjorie H. O'Laughlin, Clerk
By /s/ Kent A. Phenis, Deputy

SEAL